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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CHARLES KNIGHT, Defendant and Appellant.	E060671 (Super.Ct.No. FVA1200416) OPINION

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed.

David L. Annicchiarico, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

On a night when his wife was babysitting the 12-year-old victim, 37-year-old defendant and appellant Michael Knight snuck into the room where the victim was sleeping and molested and raped her. As a result of this incident, a jury convicted defendant of five felony sexual offenses: (1) forcible rape of a child under the age of 14[1]; (2) forcible oral copulation of a child under the age of 14[2]; (3) forcible sexual penetration of a child under the age of 14[3]; (4) and two lewd acts on a child under the age of 14.[4] The trial court sentenced defendant to a total term of 44 years to life in state prison. Specifically, it sentenced defendant to 15 years to life for the rape; a consecutive term of 15 years to life for the oral copulation; a consecutive term of 10 years for the sexual penetration; and consecutive terms of two years for each of the lewd acts.

Defendant raises several arguments on appeal. As to the forcible crimes, he argues that: (1) while the evidence proved he committed each of the sexual acts, there was insufficient evidence to support a finding that he did so by forcible means; (2) the court erred in failing to instruct the jury on lesser included offenses; and (3) the court

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[1] Penal Code section 261, subdivision (a)(2) and (6), and section 269, subdivision (a)(1) (count 1). Note: all further statutory references are to the Penal Code.

[2] Section 288a, subdivision (c), and section 269, subdivision (a)(4) (count 2).

[3] Section 289, subdivision (a)(1)(B) (count 3). "Sexual penetration" is vaginal or anal penetration with an instrument or body part other than the penis. (§ 289, subd. (k)).

[4] Section 288, subdivision (a) (counts 4 & 5).

erred in imposing full, consecutive sentences. As for the nonforcible crimes (the lewd acts), defendant argues that one of the counts must be reversed on double jeopardy principles because the counts were not based on separate, completed offenses, but rather on a single, "continuous" touching of the victim's breasts and vagina.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's wife was the victim's long-time babysitter. Multiple times a week for three years, she would babysit the victim and her younger sister at the home she shared with defendant.

On the evening of September 16, 2011, the victim's mother dropped the girls off at defendant's house so that she could go out of town for the weekend and celebrate her birthday with her husband.[5] The evening began in the typical fashion. The girls ate pizza, played, and watched television with defendant's children. At some point in the night, defendant walked into the room where the children were watching television and told them to go to sleep. The victim's sister shared a room with defendant's children, and the victim slept by herself in the guestroom.

Around 11:00 p.m., defendant walked into the victim's room and stood next to her bed in silence.[6] The victim asked him if something was wrong and he told her he was

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[5] At the time of the incident, they had not yet married but were dating.

[6] The following facts regarding the sexual assault come from the victim's trial testimony. Defendant did not testify.

"just looking outside." The victim could not remember how long he remained in her room before leaving. Defendant came back into the room a second time and looked out the window. At this point, the victim began to feel uncomfortable. She was afraid that "something bad was going to happen" because she was not aware of anything going on outside.

When defendant left, she turned on the television in the guestroom, in the hope that it would keep him from returning. It did not. Defendant entered the victim's room a third time, turned off the television, and sat down next to her on the bed.

Defendant began touching the victim's vagina over the covers. After a few moments, he stood up, stroked her face with his fingers, and slid his fingers into her mouth. The victim did not want defendant to touch her, and his behavior made her feel "worried."

Defendant moved his hands to the victim's chest and fondled her breasts over her pajama top. At this point, the victim did not move because she was scared that "[defendant] was going to rape me." She did not want to look at him, so she turned her head away and closed her eyes.

Defendant then lifted up the victim's pajama top and stroked her bare stomach. He slid his hand underneath her underwear and put his finger inside her vagina. When he put his finger inside her, the victim asked defendant what he was doing. He replied, "Nothing. Go back to sleep," and he pulled down her underwear and opened her legs.

Defendant laid himself between her legs, put his hands on her thighs, and began licking her vagina. For about 15 minutes, defendant orally copulated the victim while intermittently moving his finger in and out of her vagina.

The victim used her left leg to kick defendant in his neck/upper chest area because she thought she was "going to be able to kick him away," but he did not stop. After that she was "too scared to do anything [else]." She felt as though she could not get away from defendant because his hands were on her thighs and she thought "he would [just] pull me back."

After the copulation, defendant kneeled between the victim's legs and pulled down his shorts. He "got over" the victim and put his penis in her vagina. The victim felt pain, like "something smashing [her]." As he penetrated her, he kissed her and put his tongue in her mouth. The victim did not try to push him off because she was "too scared to do anything."

At some point, defendant got off of the victim and pulled up his pants. He pulled her pajama pants up to her knees and left the room.

As soon as he left, the victim texted her mother for help and began to cry. Defendant came back into the room while she was texting her mother and told her not to tell anyone about what had happened. This made her feel "disgusted." When defendant saw her cell phone, he said, "I know you told your mom." She denied that she had told her mom and defendant responded that she should "keep the night between [them]."

The victim's mother immediately sent someone to pick up her daughters. The mother made it back home around 3:00 a.m., and took the victim to the police station to file a report.

The victim testified that she does not know what ejaculation is and does not know whether it occurred. After the intercourse, she felt some wetness on the outside of her vagina but not on the inside.

A swab taken of the victim's vestibule (the internal genital structure past the labia but before the vagina) contained male DNA. The criminalist who analyzed the swab testified that the probability that the DNA belonged to an African-American male other than defendant was one in 140 billion.

During closing argument, defense counsel argued that the victim was lying and that the incident had not occurred. He argued that various aspects of the case invited reasonable doubt, such as the evidence that the victim did not want to stay with a babysitter that night and, thus, was looking for a reason to get picked up from defendant's house; that she did not call for help when defendant was first walking in and out of her room; that she did not cry when reporting the incident to the authorities or during her trial testimony; and that the "small" amount of defendant's DNA on her genitals could have come from "using a dirty tissue in the bathroom."

DISCUSSION

1. *The forcible offenses (counts 1, 2 and 3)*

a. *The convictions are supported by sufficient evidence of the use of fear*

Defendant argues that his convictions for forcible rape, oral copulation, and sexual penetration should be reversed for insufficient evidence. He admits that "the evidence proved that [he] committed the sex offenses," but he contends that no rational jury could have found that he did so by the required means of force, violence, duress, menace, fear of immediate and unlawful bodily injury, or threat of retaliation. We disagree.

" 'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Jurado* (2006) 38 Cal.4th 72, 118.) All conflicts of evidence are resolved in favor of the judgment and all reasonable inferences are drawn in its favor. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) " ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " (*People v. Burney* (2009) 47 Cal.4th 203, 253.) In other words, convictions can be reversed only if " ' "on no hypothesis whatever is

there sufficient substantial evidence to support the verdict." ' " (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1332.)

We conclude that substantial evidence supports a finding that defendant accomplished all three offenses by means of fear of immediate and unlawful bodily injury. The Supreme Court set forth a definition for the element of fear of immediate and unlawful bodily injury in *People v. Iniguez* (1994) 7 Cal.4th 847 (*Iniguez*). In that case, the 22-year-old victim spent the night before her wedding at the home of a close family friend. (*Id.* at p. 851.) Around 1:00 a.m., the victim was awakened when the family friend's fiancé approached her from behind, naked. (*Ibid.*) He "pulled down her pants, fondled her buttocks, and inserted his penis inside her." (*Ibid.*) The victim testified that she " 'was afraid, so I just laid there.' " (*Ibid.*) Several days after the attack, she told the investigating officer that she " 'was afraid that if she said or did anything, [the defendant's] reaction could be of a violent nature.' " (*Id.* at p. 852.) The Court of Appeal held that there was insufficient evidence that the defendant had accomplished the rape by means of fear because he " 'did nothing to suggest that he intended to injure [the victim].' " (*Id.* at p. 853.)

The Supreme Court disagreed with the appellate court's focus on the defendant's actions and state of mind. (*Iniguez, supra*, 7 Cal.4th at pp. 854-856.) It stated that the fear analysis is comprised of both a subjective and an objective component. (*Id.* at p. 856.) The subjective component "asks whether a victim genuinely entertained a fear of

immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will." (*Ibid.*) The "extent or seriousness" of the subjective fear is "immaterial" and the victim is not required to articulate "what precisely she feared," because " '[f]ear' may be inferred from the circumstances despite even superficially contrary testimony of the victim." (*Id.* at pp. 856-857.) Additionally, " '[t]he kind of physical force that may induce fear in the mind of a woman is immaterial,' " as even " 'embracing and kissing [a victim] against her will' " could cause her to feel genuine fear. (*Id.* at p. 856, quoting *People v. Harris* (1951) 108 Cal.App.2d 84, 89.) The objective component "asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it." (*Iniguez*, at p. 857.) The court emphasized that "the particular means by which fear is imparted" is immaterial to the reasonableness of the fear. (*Ibid.*)

Applying this test, the court held that the jury heard evidence sufficient to support a finding that the victim's fear was genuine and reasonable. (*Iniguez*, *supra*, 7 Cal.4th at p. 857.) Her fear was genuine because her testimony and statements to the investigating officer demonstrated that she was so afraid that defendant would "do something violent," that she was unable to fight back or voice her objection. (*Id.* at pp. 857-858.) Her fear was reasonable because a "[s]udden, unconsented-to groping, disrobing, and ensuing sexual intercourse while one appears to lie sleeping is an appalling

and intolerable invasion of one's personal autonomy that, in and of itself, would reasonably cause one to react with fear." (*Id.* at p. 858.)

The court held that the victim's fear "allowed [the defendant] to accomplish sexual intercourse with [her] against her will." (*Iniguez*, *supra*, 7 Cal.4th at p. 859.) Thus, under *Iniguez*, where there is evidence that the defendant invaded the victim's personal space and molested her while she was trying to sleep, coupled with evidence that she was genuinely afraid, a jury can reasonably infer that such fear allowed the defendant to accomplish the attack against the victim's will. (*Id.* at pp. 851, 858.)

Here, there is sufficient evidence to support a finding that defendant accomplished the three forcible crimes by making the victim so genuinely and reasonably afraid that she was unable to fight back. Like the woman in *Iniguez*, the victim minimized her resistance out of fear that it would only result in an escalation of violence. Specifically, the victim testified that, except for a single, unsuccessful kick, she did not fight back against defendant while he penetrated her vagina with his fingers, tongue, and penis because she was afraid that if she did so he would rape her.[7] This testimony is substantial evidence of genuine fear.

[7] The 12-year-old victim understood the meaning of rape. She testified that rape is "when somebody forces you to have sex."

Moreover, the evidence demonstrates that the victim's fear was reasonable. As the long-time babysitter's husband, defendant occupied a position of authority and trust. The victim knew him and had stayed at his house multiple times a week for three years. He was also much older, larger, and stronger than the victim.[8]

Defendant used his position of authority to order the children to go to bed so that he would have the opportunity to sneak into the victim's room, turn off the television she was using to try to keep him out, and tell her to go to bed while he used her body to gratify his sexual desires. Any 12-year-old girl would be afraid in such a situation. As the court in *Iniguez* stated, it is reasonable to feel fear when someone begins to grope and disrobe you without your consent while you are attempting to sleep. (*Iniguez, supra*, 7 Cal.4th at p. 858.) We therefore conclude that a rational jury could have found that defendant accomplished the forcible crimes by means of fear.

Without citing any supporting authority, defendant contends that "fear of sexual assault" can never constitute fear of immediate bodily injury. He is incorrect. A rule disqualifying the fear of rape from the realm of genuine fear would run afoul of the rule that victims are not required to articulate their fear and that the seriousness of their fear is immaterial. (*Iniguez, supra*, 7 Cal.4th at pp. 856-857.) It would also create the perverse

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[8] The probation report states that defendant is a six-foot tall, 180-pound United States Air Force veteran.

incentive for victims to simply testify that they were afraid the defendant would hurt them as opposed to admitting that the precise pain they feared was from being raped.

We also reject defendant's argument that we apply the holding in *People v. Jeff* (1988) 204 Cal.App.3d 309, where the Court of Appeal concluded the defendant had not used fear to accomplish the rape of the six-year-old victim because he never threatened or punished her or told her not to tell. *Jeff* was decided before *Iniguez*, where the use of threats or physical punishment was not required in order for a victim's genuine fear to be reasonable. As explained *ante*, the act of attacking a victim while she is trying to sleep is sufficient to instill reasonable fear in the victim's mind. (*Iniguez, supra*, 7 Cal.4th at p. 858.)

b. *The court had no duty to instruct on lesser included offenses*

Defendant argues that the court erred by failing to instruct the jury on the following lesser included offenses: unlawful sexual intercourse with a minor who is more than three years younger than the defendant[9] as a lesser included offense of forcible rape; oral copulation of a minor[10] as a lesser included offense of forcible oral copulation; and sexual penetration of a minor[11], lewd acts with a minor,[12] and sexual battery,[13] as

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[9] Section 261.5, subdivision (c).

[10] Section 288a, subdivision (b)(1).

[11] Section 289, subdivision (h).

lesser included offenses of forcible sexual penetration. Assuming that all of these offenses are lesser included offenses of the charged crimes, we nevertheless conclude that the trial court was not required to instruct the jury on them.

We independently review claims that a trial court erroneously failed to instruct on a lesser included offense, and in doing so consider the evidence in the light most favorable to the defendant. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5.) A trial court is required to instruct on lesser included offenses only when there is " ' "substantial evidence raising a question as to whether all of the elements of the charged offense are present." ' " (*Cole*, at p. 1215.) Substantial evidence to support an instruction on a lesser included offense is evidence from which a reasonable jury could conclude that the defendant committed "the lesser offense, *but not the greater*." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*), italics added.)

Here, the record is devoid of evidence that would permit a reasonable jury to find that defendant committed the sexual penetration, oral copulation, and rape without the use of fear. As detailed in the section on fear, *ante*, the evidence presented at trial supports a reasonable finding that the victim minimized her resistance to defendant's

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12 Section 288, subdivision (a).

13 Section 243.4.

attacks because she was genuinely and reasonably afraid that resistance would only escalate the violence. Defendant's sole defense to the victim's testimony was that she was lying and that she could have placed his DNA on her genitals by using a piece of soiled tissue.

"A trial court need not . . . instruct on lesser included offenses when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime." (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5.) In other words, a court has no duty to instruct on a lesser included offense where, "[i]f the jury believed [the prosecution's witnesses], the elements of [the charged crime] were established." (*People v. King* (2010) 183 Cal.App.4th 1281, 1319.) Because the jury's choice here was to believe the victim or to find that she had made the incident up, we conclude that the trial court had no duty to instruct the jury on any lesser included offenses of the forcible crimes.

Furthermore, even if it were error for the court not to instruct on lesser included offenses, that error would be harmless. In a noncapital case, the failure to instruct on lesser included offenses is "reviewed for prejudice exclusively under *Watson*." (*Breverman*, *supra*, 19 Cal.4th at p. 178; see *id*. at p. 149, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) "[P]osttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*Id.* at p. 177.) This review should consider "whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a

different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Ibid.*) It is not probable the jury would have convicted defendant of anything less than the charged offenses because the evidence of the victim's genuine and reasonable fear was overwhelming compared to evidence that she was lying.

c. *The court did not err in sentencing defendant to full, consecutive sentences*

Defendant argues that the trial court erroneously sentenced him to full, consecutive terms for counts 1, 2, and 3. Specifically, he argues that if the court sentenced him under section 667.6, subdivision (d), the sentence must be reversed because there was insufficient evidence that the crimes occurred on "separate occasions" as that term is used in that section. In the alternative, he argues that if the court sentenced him under section 667.6, subdivision (c), the sentence must be reversed because the court's statement of reasons was inadequate.

Section 667.6, subdivisions (c) and (d), constitute a "harsher" consecutive sentencing alternative to the "principal/subordinate scheme of section 1170.1." (*People v. Belmontes* (1983) 34 Cal.3d 335, 344, 348.) This harsher consecutive sentencing scheme applies when a defendant has committed more than one of the sex offenses listed

in section 667.6, subdivision (e).[14] Section 667.6, subdivision (d), provides that a court *must* impose a "full, separate, and consecutive term" for each offense "if the crimes involve separate victims or involve the *same victim on separate occasions*." (§ 667.6, subd. (d), italics added.) Section 667.6, subdivision (c), gives the court discretion to impose full, separate, and consecutive terms for each offense "if the crimes involve the same victim on the *same occasion*." (§ 667.6, subd. (c), italics added.)

i. *The court sentenced defendant under section 667.6, subdivision (d)*

Because each subdivision has its own sentencing requirements, as an initial matter we must decide which subdivision the trial court sentenced defendant under. Defendant argues that the trial court sentenced him under section 667.6, subdivision (d), because at the sentencing hearing, the court found that he had "time to reflect" before committing each of the forcible sex crimes. He points out that the concept of time to reflect between offenses is part of the analysis to determine whether the offenses occurred on "separate occasions" under section 667.6, subdivision (d).

The People argue that the trial court sentenced him under section 667.6, subdivision (c), because the court stated at the sentencing hearing that the offenses occurred on "the same occasion." They argue that the finding that defendant had "time to

[14] Counts 1, 2, and 3 are included in this list.

reflect" was not a finding under section 667.6, subdivision (d), but rather under 667.6, subdivision (c), regarding the manner in which appellant committed the offenses. We think defendant's is the correct interpretation.

At the sentencing hearing, the court referenced the probation report as it made its findings. The court first analyzed the probation report's discussion of aggravating and mitigating factors, i.e., rules 4.413 and 4.414 of the California Rules of Court, and made findings as to those factors. The court then stated that it was moving on to the issue of sentencing for the conviction of "multiple sex crimes [under] rule [4.]426," which is the implementing rule for section 667.6. (See Cal. Rules of Court, rule 4.426.) The People read the court's next statement as a finding that the crimes occurred on the same occasion; however, we read it as a recitation and rejection of the probation report's recommendation. Specifically, we read the court's statement as follows: "And then [the report states that] the defendant was convicted of multiple sex crimes against one victim on the same occasion, *but I want to indicate* that based upon the testimony between each different sexual offense, the defendant clearly had time to reflect, and I think that's very important when it comes to consecutive sentences."

Our reason for this interpretation is twofold. First, under a section entitled, "Violent Sex Crimes (Rule 4.426)," the probation report contains the exact language the court read aloud, i.e., "the defendant was convicted of multiple sex crimes against one victim on the same occasion." This language serves as the basis for the report's

recommendation that defendant be sentenced under 667.6, subdivision (c). Second, immediately after reading that statement from the probation report, the court stated, "but I want to indicate that . . . the defendant clearly had time to reflect," and reflection is a factor of the "separate occasions" analysis under section 667.6, subdivision (d). Namely, when a court is determining whether offenses occurred on the same or separate occasions, Section 667.6, subdivision (d), requires it to "consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d).) Because the concept of "time to reflect" is specific to the "separate occasions" analysis under section 667.6, subdivision (d), and because the court explicitly found that defendant had time to reflect, we conclude that the court sentenced defendant under the mandatory provisions of that section.

i. *The sentence was lawful*

The issue now becomes whether there was sufficient evidence to sentence defendant to full, consecutive terms under section 667.6, subdivision (d). Defendant argues that he did not have "a reasonable opportunity to reflect, as that concept is defined by law." We disagree.

The portion of section 667.6, subdivision (d), governing the "separate occasions" determination states in full: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether,

between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. *Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack*, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d), italics added.)

"Our Supreme Court has recently summarized case law construing the 'separate occasions' requirement . . . as follows: 'Under the broad standard established by . . . section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in physical location.' " (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1091-1092 (*Garza*), citing *People v. Jones* (2001) 25 Cal.4th 98, 104.) In reviewing the handful of cases analyzing time for reflection under section 667.6, subdivision (d), the Supreme Court noted that " '[a] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.' " (*Jones*, at p. 104, citing *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071.) "Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*Garza*, at p. 1092.)

Two Court of Appeal cases in particular demonstrate that the opportunity to cease the assault, not the passage of time, is the key consideration in determining reasonable time for reflection. In *People v. Garza*, the court held that the sequence of events during a single assault as defendant moved from one offense to the next afforded the defendant adequate opportunity to reflect upon his actions. (*Garza*, *supra*, 107 Cal.App.4th at pp. 1092-1093.) In that case, the defendant sexually assaulted the victim in his car after she accepted his offer to drive her to her friend's house. (*Id.* at pp. 1086-1087.) Instead of taking the victim to her desired destination, the defendant grabbed the back of her neck and forced her to orally copulate him at gunpoint. (*Ibid.*) He ordered her to take off her clothes, punched and threatened her when she refused, and got undressed with her. (*Id.* at p. 1087.) He then got on top of her, put his fingers in her vagina, touched her breasts, put his gun on the back seat, pulled her legs around his shoulders, and began to rape her. (*Ibid.*) The victim asked him to stop, but he put his hand over her mouth, told her to " 'Shut up,' " and continued to rape her. (*Ibid.*)

The Court of Appeal affirmed defendant's full, consecutive sentences for forcible oral copulation, digital penetration, and rape. (*Garza*, *supra*, 107 Cal.App.4th at pp. 1090-1092.) It held that the "sequence of events" between the time when he forced her to orally copulate him and when he raped her "afforded him ample opportunity to reflect on his actions and stop his sexual assault." (*Id.* at p. 1092.) It also held that the defendant had an "adequate opportunity to reflect upon his actions" between the digital

penetration and the rape because he could have reflected at any time as he "(1) began to play with the victim's chest; (2) put his gun on the back seat; (3) pulled the victim's legs around his shoulders and, finally, (4) forced his penis inside her vagina." (*Id.* at pp. 1092-1093.)

In *People v. King*, the court held that the defendant had an adequate opportunity to reflect when he "momentarily paused" during the sexual assault. (*People v. King, supra,* 183 Cal.App.4th at pp. 1325-1326.) In that case, a police officer fondled the victim's breasts and put his fingers inside her vagina on the side of the road "under the ruse that he was performing a lawful search." (*Id.* at p. 1325.) The digital penetration lasted about one minute total. (*Id.* at p. 1290.) The officer had been moving his fingers inside her vagina for about thirty seconds when a car passed by. (*Ibid.*) The officer removed his fingers and looked around uneasily when he saw the car's lights. (*Ibid.*) After the car passed, he inserted his fingers for another thirty seconds. (*Ibid.*)

The Court of Appeal held that a reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection during the moments between the first and second digital penetrations. (*People v. King, supra,* 183 Cal.App.4th at p. 1326.) It agreed with the trial court's reasoning that the passing car gave the officer " 'the opportunity to reflect about his actions' " and that he " 'could have stopped' " his assaultive behavior, but decided instead to resume. (*Id.* at p. 1325.)

Here, like the defendants in *Garza* and *King*, defendant had an opportunity to reflect on his actions as he moved from one forcible sexual assault to the next. When he inserted his fingers inside the victim's vagina, the victim asked him what he was doing. Rather than stopping his assault, he told her, "Go back to sleep," and he proceeded to pull down her pajamas and underwear and lay down between her legs so that he could orally copulate her. During the copulation, the victim kicked defendant in the neck area in an attempt to move him off of her. Again, instead of ending the assault, defendant continued to orally copulate her. After about 15 minutes of copulation, the defendant got onto his knees. At this point he could have gotten off the bed and left the room, but instead he decided to escalate the attack. He pulled down his pants, moved on top of the victim, and forced his penis into her vagina. On this evidence, we are unable to conclude that no reasonable trier of fact could have inferred that defendant had a reasonable opportunity for reflection after completing one forcible offense and beginning the next. (See *Garza*, *supra*, 107 Cal.App.4th at p. 1092.)

Defendant's reliance on *People v. Corona* (1988) 206 Cal.App.3d 13 (*Corona*) and *People v. Pena* (1992) 7 Cal.App.4th 1294 (*Pena*) does not affect our conclusion. The courts' holdings in those cases do not apply here because they hinge on the fact that neither court was able to identify *any* appreciable interval between the sexual acts. (*Corona*, at p. 18; *Pena*, at p. 1316.)

In *Corona*, the defendant kidnapped the victim and began sexually assaulting her in his car. (*Corona, supra*, 206 Cal.App.3d at p. 15.) He removed her pants, kissed her, put his finger in her vagina, kissed her genitals, then put his penis inside her vagina. (*Ibid.*) After about five minutes, the defendant got out of the car. (*Ibid.*) He returned about five minutes later and raped her again.[15] (*Ibid.*) The Court of Appeal upheld full consecutive sentences for the two rapes because the time the defendant spent outside of his car could reasonably support "an inference that in this interval defendant had a reasonable opportunity to reflect upon his actions." (*Id.* at pp. 17-18.) As to the multiple sex acts that occurred before the defendant got out of his car, the court found that the People had impliedly conceded that these did not occur on separate occasions. (*Id.* at p. 16.) The court agreed with the implied concession because its review of the record revealed "no evidence of any interval 'between' these sex crimes." (*Id.* at p. 18.) Likewise in *Pena*, where the defendant raped the victim then violently flipped her legs around and orally copulated her, the court held that there was insufficient evidence of an opportunity to reflect because it could not find "any appreciable interval 'between' the [two sexual acts]." (*Pena, supra,* 7 Cal.App.4th at p. 1316.)

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[15] The fact section of the opinion actually states that the defendant "engaged in another bout of [oral] copulation" when he returned to his car; however, defendant was charged with two counts of rape and only one count of oral copulation, and, in the discussion section, the court refers to the post-car-return offense as a rape, not an oral copulation. (*Corona, supra*, 206 Cal.App.3d. at pp. 14-17.) Accordingly, we read this portion of the fact section to be an inadvertent mistake.

The holdings in these cases do not apply here because our record contains evidence of "appreciable intervals" between the forcible sex offenses. Contrary to defendant's assertion, it does not matter that the entire molestation episode was continuous and did not involve a "change of rooms" or "interspersed violence." While the Court of Appeal has held that such circumstances indicate an opportunity for reflection (see *People v. Plaza* (1995) 41 Cal.App.4th 377, 384-385), they are by no means requirements. (See *id.* at p. 385 ["As the statute tells us, the duration of time between the acts and the retention of the *opportunity to attack* again are not themselves determinative"].)

We therefore conclude that the sentences for counts 1 through 3 are lawful under section 667.6, subdivision (d). However, we also note for the sake of argument, that even if the crimes did not occur on separate occasions as a matter of law, the trial court's error in sentencing defendant under section 667.6, subdivision (d), would be harmless because the court had discretion to impose the same sentences under section 667.6, subdivision (c).

As discussed earlier, the record of the sentencing hearing is not entirely clear about whether the trial court sentenced defendant under subdivision (c) or (d) of section 667.6. We think the best reading is that the court used subdivision (d); however, the record also supports the imposition of the sentences under subdivision (c).

"What a trial court must do in order to properly impose consecutive sentences pursuant to section 667.6, subdivision (c) is best described . . . in *People v. Belmontes* (1983) 34 Cal.3d 335, 347-348." (*Pena, supra*, 7 Cal.App.4th at p. 1317.) The " '*crucial factor*' " is that " '*the record reflect recognition on the part of the trial court that it is making a separate and additional choice in sentencing under section 667.6, subdivision (c)*' " as opposed to sentencing under the less harsh provisions of section 1170.1. (*Pena*, at p. 1317, quoting *People v. Belmontes*, *supra*, 34 Cal.3d at pp. 347-348.) Here, the trial court satisfied the *Belmontes* requirement because: (1) it found that the evidence demonstrated that defendant had time to reflect on his actions between offenses; (2) such a finding warranted consecutive sentences; and (3) it was imposing the sentence under rule 4.426 of the California Rules of Court, which is a reference to section 667.6. These statements and findings demonstrate that the court made a reasoned and knowing choice in sentencing defendant under section 667.6 rather than section 1170.1.

In *Pena*, after holding that the sentence was unlawful under section 667.6, subdivision (d), the court went on to find that the sentence was nevertheless authorized under subdivision (c). (*Pena, supra,* 7 Cal.App.4th at p. 1316.) The basis for this holding was that "the trial court [had] expressed the intent to impose consecutive sentences pursuant to subdivision (c) of section 667.6 as well" and its statements at the sentencing hearing satisfied *Belmontes*. (*Ibid.*) The Court of Appeal upheld the conviction, stating "[o]n this record, to remand the matter for resentencing would be

worse than an 'idle gesture.' " (*Id.* at p. 1318, citing, e.g., *People v. Blessing* (1979) 94 Cal.App.3d 835, 839.) Finding ourselves in a similar situation, we affirm the consecutive sentences.

d. *Defendant's sentences for the nonforcible offenses (counts 4 & 5) do not violate the double jeopardy rule*

Defendant was convicted of two violations of section 288, subdivision (a), for lewd acts on a minor: one count for fondling the victim's breasts, the other for rubbing her vagina. Defendant characterizes the incident as "an unbroken course of fondling," during which he "touche[d] different parts of the minor's body." He argues that the conviction for either count 4 or count 5 violates the double jeopardy rule because he only committed one lewd act and is being punished twice for it. We disagree with defendant's characterization of the molestation and conclude that the California Supreme Court has explicitly precluded the outcome he seeks.

To ensure double jeopardy protections, a defendant can only be convicted of multiple violations of the same statute if there were multiple "completed" crimes. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1474.) A violation of section 288 occurs whenever a defendant touches a child under the age of 14 with the intent of "arousing, appealing to, or gratifying" the defendant's or the child's "sexual desires." (§ 288, subd. (a).)

A review of the precedent on multiple completed sex crimes is useful here. In *People v. Harrison* (1989) 48 Cal.3d 321, the defendant was convicted of three counts of sexual penetration with a foreign object (§ 289) in connection with a single incident when he broke into the victim's bedroom and inserted his finger into her vagina three separate times. (*Harrison*, at pp. 324-327.) The victim pulled away from defendant twice, dislodging his finger when she did so. (*Id.* at pp. 325-326.) Despite the proximity and similarity of the three penetrations, the court concluded that each warranted a separate conviction. (*Id.* at p. 329.) The court explained that "a *new and separate* violation of section 289 is 'completed' each time a *new and separate* 'penetration, however slight' occurs." (*Ibid*.)

In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the court applied this rule and *Harrison's* reasoning to multiple violations of section 288. There, the defendant was charged with 14 counts of lewd and lascivious acts. (*Id.* at p. 339.) Ten of the counts involved sexual intercourse on separate occasions. (*Id.* at p. 337.) On two of those occasions, the sexual intercourse was accompanied by "the manual fondling of [the victim's] breasts, vagina, and buttocks," which the People charged as a separate section 288 violation from the intercourse. (*Id.* at pp. 337-338.) In other words, for each of the two occasions, the defendant was charged with one count for fondling multiple body parts, for a total of two section 288 violations based on fondling. The Court of Appeal

reversed the two section 288 fondling convictions on the ground that the fondling was " 'indivisible' " from the accompanying sexual intercourse. (*Id.* at p. 340.)

The Supreme Court disagreed. It held that the fondling was a separate completed offense from the sexual intercourse. (*Scott, supra,* 9 Cal.4th at p. 348.) It stated that "one offense is complete and another one begins whenever the perpetrator stops and resumes unlawful activity during a sexual assault." (*Id.* at p. 345.) It explained: "*Each individual act* that meets the requirements of section 288 can result in a 'new and separate' statutory violation." (*Id.* at pp. 346-347, italics added.)

Applying this rule, the court observed that the victim "testified that during both [occasions], defendant fondled an intimate part of her body and also had sexual intercourse with her." (*Scott, supra,* 9 Cal.4th at p. 348.) It concluded that "[e]ven in the absence of testimony describing the precise sequence of the various acts, the jury could reasonably conclude that a total of four lewd acts and four violations of section 288 had occurred on [the two] occasions." (*Ibid.*)

In *People v. Jimenez* (2002) 99 Cal.App.4th 450 (*Jimenez*), the Court of Appeal extended the reasoning in *Harrison* and *Scott* to multiple counts of fondling that occurred during one incident. In that case, the defendant was charged with multiple counts of section 288 violations for fondling multiple parts of his eight-year-old neighbor's body while she was sleeping over at his house. (*Id.* at pp. 452-453.) The evidence showed that the defendant rubbed the victim's breasts, squeezed her thighs, touched her vagina, put

his finger in her vagina, rubbed her buttocks, and put his finger insider her anus. (*Id.* at p. 452.) The jury convicted him of six lewd and lascivious acts. (*Id.* at p. 453.)

On appeal, the defendant argued, just as defendant does here (see *infra*), that the holding in *Scott* did not justify his multiple convictions because there the defendant "was convicted of *one* lewd and lascivious act in connection with the fondling of *several parts of the victim's body*," and, "[t]hus, *Scott* did not address whether the fondling of several parts of the body may be charged as *multiple* offenses." (*Jimenez*, *supra*, 99 Cal.App.4th at p. 454, italics added.)

The Court of Appeal agreed that *Scott's* holding did not directly apply to a case involving multiple section 288 violations for fondling multiple body parts; however, it held that the reasoning behind *Scott* and *Harrison* "goes much further" than the particular facts of those cases. (*Jimenez*, *supra*, 99 Cal.App.4th at pp. 454-455.) In so reasoning, the *Jimenez* court cited the Supreme Court's statement in *Scott* that " 'a more lenient rule of conviction should not apply simply because more than one lewd act occurs on a single occasion,' " otherwise, " 'the clever molester could violate his victim in numerous lewd ways, safe in the knowledge that he could not be convicted and punished for every act.' " (*Jimenez*, at p. 455, quoting *Scott*, *supra*, 9 Cal.4th at p. 347.) The *Jimenez* court also noted that, in a footnote in *Scott*, the Supreme Court "rejected the defendant's argument that, when multiple lewd acts are committed on the same occasion, the number of convictions is limited to the number of acts separately defined as a crime and cannot

include 'undefined' conduct such as *fondling*." (*Jimenez*, at p. 455, quoting *Scott, supra*, 9 Cal.4th at p. 348, fn. 10.)

The *Jimenez* court summarized the multiple convictions rule as follows: "Where a defendant fondles a portion of the victim's body with the requisite intent, a violation of section 288 has occurred. The offense ends when the defendant ceases to fondle that area. Where a defendant fondles one area of the victim's body and then moves on to fondle a different area, one offense has ceased and another has begun." (*Jimenez, supra*, 99 Cal.App.4th at p. 456.) It emphasized that "[t]here is no requirement that the two be separated by a hiatus, or period of reflection." (*Ibid.*) Applying this rule, it affirmed defendant's six convictions. (*Ibid.*)

The analysis and holding in *Jimenez* is directly applicable to this case. Here, as in *Jimenez*, the evidence indicates that defendant fondled one area of the victim's body and afterward moved on to fondle a different area. The victim testified that defendant touched her vagina over the covers when he first sat down on the bed. It was only after standing up, stroking her face, and putting his fingers in her mouth, did he start to fondle the victim's breasts. This testimony would allow a reasonable jury to conclude that defendant completed his fondling of the victim's vagina before he began fondling her breasts. Moreover, the trial court instructed the jury on the elements for a violation of section 288, and it explained that counts 4 and 5 are "separate crime[s]" and that the jury

"must consider each count separately and return a separate verdict for each one." We therefore conclude that substantial evidence supports two section 288 convictions.

Defendant urges us not to follow the holding in *Jimenez* and instead to conclude that *Scott's* holding is inapplicable to these facts. He argues that while the court's ruling in *Scott* "may appear, at first blush, to address the question presented [here]," the holding "should not be read overly broadly." Like the defendant in *Jimenez*, defendant attempts to draw a meaningful distinction between the types of charges at issue here. However, we agree with the *Jimenez* court that this is a factual distinction without significance. To hold as defendant suggests would violate the rule that "[e]ach individual act that meets the requirements of section 288" can result in a separate offense. (*Scott*, *supra*, 9 Cal.4th at pp. 346-347.)

Moreover, as the court noted in *Jimenez*, the fact that the defendant in *Scott* was not convicted of more than one section 288 violation for fondling multiple parts of the victim's body was not a result of the application of any rule, but was rather "a function of [the defendant] having been charged with only one offense." (*Jimenez*, *supra*, 99 Cal.App.4th at p. 455.) We must assume based on the Supreme Court's formulation of the multiple conviction rule that, had the defendant in *Scott* been so charged, and had the evidence showed (as it does here and did in *Jimenez*) that he stopped fondling one body part before moving on to the next, the Supreme Court would have upheld multiple convictions. (See *Scott*, *supra*, 9 Cal.4th at p. 348, fn. 10 ["[A] separate violation of

section 288 can be based on each distinct lewd act committed against the victim on the same occasion"].)

Defendant also urges us to hold that *Jimenez* was wrongly decided. He claims that if courts allowed multiple section 288 convictions where a defendant engages in "an unbroken touching of different body parts" with "no measurable break that would suggest the end to one crime and the beginning of another" the results would be absurd and inconsistent. As we have stated, we do not characterize defendant's conduct as "unbroken" and without "measureable breaks." By our review of the victim's testimony, he stopped touching her vagina, stroked her face, and put his fingers in her mouth before touching her breasts. The general assaultive nature of his behavior may have been unbroken, but the specific crimes committed as a result of that behavior are separate and distinct.

Secondly, allowing multiple convictions for fondling multiple body parts does not lead to absurd and inconsistent results on these facts. In an attempt to demonstrate the absurd results that would flow from applying *Scott* and *Jimenez* to this case, defendant asks whether a defendant who "never lifts his hand but moves it to a new body part" could be convicted of multiple section 288 violations. We are not called upon to answer that question because, on the facts of this case, we have no difficulty concluding that the evidence supports convictions for two separate lewd acts. (See *Jimenez*, *supra*, 99

Cal.App.4th at p. 456 [refusing to answer the question posed in defendant's hypothetical because the hypothetical facts did not match the evidence in that case].)

Defendant argues that the correct approach to imposing multiple section 288 convictions is to require a break in the touching that indicates the defendant has "renewed his criminal behavior." Defendant would have us read into the rule that "[e]ach individual act that meets the requirements of section 288 can result in a 'new and separate' statutory violation" (*Scott*, *supra*, 9 Cal.4th at pp. 346-347), an additional requirement that a defendant cease and then renew his criminal behavior. Putting aside the practicalities of what this "criminal behavior" analysis would look like, or how it would lead to more consistent results than the current "individual criminal acts" analysis, we refuse on principle to add such a requirement to the rule. To do so would thwart the Legislature's intent to punish each violation of section 288.

Moreover, we agree with the court's reasoning in *Jimenez*, that "[a] defendant who violates multiple areas of the victim's body is deserving of greater punishment." (*Jimenez, supra*, 99 Cal.App.4th at p. 456.) Defendant responds by arguing that the proper stage for meting out this greater punishment is sentencing, not charging. Again, defendant's argument conflicts with the purpose of section 288. "Inasmuch as section 288 treats equally all types of touching when accompanied by the requisite intent, there is no basis for treating multiple acts of fondling differently from multiple acts of other sexual touching." (*Id.* at p. 456.) Based on the evidence, the jury reasonably found that

defendant committed two separate lewd acts upon the victim, and his conviction should reflect the jury's verdict.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.